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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2010-066324-001 DT 12/07/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA ANDREA L KEVER

v.

BELEN GIOVANNA SALAZAR (001) C DANIEL CARRION

MESA JUSTICE CT-WEST
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2010–066324.

Defendant-Appellant Belen Giovanna Salazar (Defendant) was convicted in West Mesa Justice Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in denying her Motion To Dismiss, which alleged the conduct of the officers violated her right to consult with counsel, and contends the trial court erred in denying her Motion To Dismiss, which alleged the State failed to disclose the dash-cam video from the police vehicle. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On August 31, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28–1382(A)(1) & (A)(2); and speed greater than reasonable and prudent, A.R.S. § 28–701(A). Prior to trial, Defendant filed a Motion To Dismiss alleging the conduct of the officers violated her right to consult with counsel, and a Motion To Dismiss alleging the State failed to disclose the dash-cam video from the police vehicle.

At the hearing on Defendant's motions, Officer Alejandro McDaniel testified he was on duty on August 31, 2010. (R.T. of Aug 9, 2011, at 6.) At approximately 10:27 p.m., he saw a vehicle traveling at 70 miles per hour in a 45 miles per hour zone. (*Id*. at 6–7, 16.) He identified Defendant as the driver of that vehicle. *(Id.* at 7.) Once he came into contact with Defendant, he saw she had the following signs of intoxication: bloodshot, watery eyes; slurred speech; and a strong odor of alcohol. (*Id*. at 7–8.) He asked her how much she had to drink, and she said, "Not much." (*Id.* at 8.) When he asked her how much is not much, she said, "Can I just call my attorney." (*Id*. at 8, 16.) Defendant had her cell phone with her, so Officer McDaniel let Defendant use her cell phone, but she said the battery was dead. (*Id*. at 8–9, 17.) Officer McDaniel did not

have a phone on him or in his vehicle for Defendant to use. (*Id*. at 17.) Officer McDaniel asked Defendant if she was willing to perform some field sobriety tests, and she said she would. (*Id*. at 9, 17.) On the one-legged stand test, Defendant showed three out of four cues; on the walk-and-turn test, she showed six out of eight cues; and on the HGN test, she showed six out of six cues. (*Id*. at 9–10, 20, 22–23.) Based on the information then known to Officer McDaniel, he placed Defendant under arrest. (*Id*. at 10–11.)

Officer McDaniel then transported Defendant to the police station. (R.T. of Aug 9, 2011, at 11.) Once they arrived at the police station, Officer McDaniel gave Defendant the *Miranda* warnings, and Defendant asked to speak to an attorney. (*Id*. at 12.) Officer McDaniel then placed Defendant in an office with a telephone and a telephone book, and Defendant called her attorney. (*Id*. at 12–13.) Defendant had Officer McDaniel speak to her attorney, who advised him that Defendant would do a breath test but would not answer any questions. (*Id*. at 13.) Officer McDaniel then brought Defendant to the DUI processing room. (*Id*. at 15–16.)

After hearing arguments from the attorneys, the trial court denied Defendant's Motion To Dismiss on the issue of voluntariness. (R.T. of Aug 9, 2011, at 50.) On the issue of the failure to disclose the videotape, Defendant's attorney did not question Officer McDaniel, but did play a tape recording of an interview of Officer McDaniel that Defendant's attorney had done about 15 to 20 minutes before. (*Id*. at 57.) In that interview, Officer McDaniel said he did not know whether there was a dash-cam videotape. (*Id*.) The parties then played the interview tape for the trial court. (*Id*. at 59–60.) Defendant's attorney said she was told the videotapes were recycled after 90 days, so any videotape would no longer be in existence. (*Id*. at 62.) After hearing arguments from the attorneys, the trial court denied Defendant's Motion To Dismiss based on the alleged discovery violation. (*Id*. at 88.) When Defendant's attorney asked if the trial court would consider any other remedy, such as suppression of evidence or the giving of a *Willits* instruction, the trial court noted Defendant had only asked for a dismissal, and if she wanted a *Willits* instruction or something else, she would have to file a motion asking for that relief. (*Id*. at 88–89.)

On August 12, 2011, Defendant executed a Waiver of Trial by Jury and submitted the matter on the record. This included the results of Defendant's breath tests, which showed BAC readings of 0.234 and 0.241. (State's Exhibit 1.) On November 21, the trial court imposed sentence. (R.T. of Nov. 21, 2011, at 4–10.) On December 2, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did the trial court abuse its discretion in finding the officers did not violate Defendant's right to consult with counsel.*

Defendant contends the trial court erred in finding the officers did not violate her right to consult with counsel. In reviewing a trial court's ruling on a motion to dismiss, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's cred-

ibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

The Arizona Supreme Court has promulgated the following Rule of Criminal Procedure:

> A defendant shall be entitled to be represented by counsel in any criminal proceeding . . . . The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, ***as soon as feasible after a defendant is taken into custody,*** at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

Rule 6.1(a), ARIZ. R. CRIM. P. (emphasis added). The Arizona Supreme Court has further stated, "[I]n a criminal DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation." *State v. Juarez*, 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989).

In the present case, Defendant was taken into custody immediately after she did poorly on the field sobriety tests, and Officer McDaniel then drove her to the police station. Once she was there, he read her the *Miranda* warnings, and when she asked to speak to her attorney, he immediately placed her in a room with a telephone and telephone book. She was then able to contact her attorney, and even had him speak to Officer McDaniel. Based on the record below, this Court concludes the record fully supports the trial court's finding that the officers did not violate Defendant's right to consult with counsel.

Defendant notes she asked, "Can I just call my attorney," right after Officer McDaniel stopped her vehicle. She contends Officer McDaniel's failure to provide her with the opportunity to call an attorney during the period from when she asked to call her attorney until she was arrested violated her right to an attorney. Officer McDaniel did, however, provide Defendant with the opportunity to make a call right after she asked if she could call an attorney. Unfortunately, the battery in Defendant's cell phone was dead.

Defendant further contends that, once Officer McDaniel could see the battery in her cell phone was dead and thus she was not able to call using her cell phone, Officer McDaniel was obligated to provide her with an alternative means of calling her attorney, and his failure to do so violated her right to an attorney. For four reasons, this Court does not agree with Defendant's contention.

First, during this period of time from when she asked to call her attorney until she was arrested, Defendant did not have a Sixth Amendment right to an attorney. The United States Supreme Court has made it clear that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges:

> The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel.

Davis v. United States, 512 U.S. 452, 456–57 (1994) (citations omitted); *accord, Montejo v. Louisiana*, 556 U.S. 778, ___, 129 S. Ct. 2079, 2085 (2009) ("[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."); *Moran v. Burbine*, 475 U.S. 412, 431 (1986) ("[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges."); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"), *quoting Kirby v. Illinois*, 406 U.S. at 682, 689 (1972); *State v. Martinez*, 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated.'"), *quoting Fellers v. United States*, 540 U.S. 519, 523 (2004). Because the State did not initiate adversary criminal proceedings until after the events in question took place, Defendant "ha[d] no constitutional right to the assistance of counsel" at that point, and thus there could not be a violation of any Sixth Amendment right to counsel.

Second, although Article 2, Section 24 of the Arizona Constitution also grants to a defendant the right to counsel, this Court is not aware of any case that holds when this right to counsel under the Arizona Constitution attaches. In *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996), the court stated as follows:

> We have been unable to locate any authority for appellee's assertion that Arizona's right to counsel is broader than the federal right. Where, as here, the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions.[2]
>
> [2] *Compare* U.S. Const. amend. VI ("the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.") *with* Ariz. Const. art. 2, § 24 ("the accused shall have the right to appear and defend in person, and by counsel . . .").

186 Ariz. at 485 & n.2, 924 P.2d at 489 & n.2. Because both the Sixth Amendment and Article 2, Section 24 use the term "the accused," and because both provisions contain essentially the same rights, this Court concludes a defendant's right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges. Because, at the time the events in question took place, Defendant did not have a right to counsel under the Arizona Constitution, there could not be a violation of any right to counsel under the Arizona constitution.

Third, under *Miranda v, Arizona*, 384 U.S. 436 (1966), a suspect has a right to consult with an attorney, but only when that person is subjected to custodial interrogation:

> [W]e held in *Miranda* that a suspect subject to ***custodial interrogation*** has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' . . . [that] ***were not themselves rights protected by the Constitution*** but were instead measures to insure that the right against compulsory self-incrimination was protected."

Davis, 512 U.S. at 457 (1994) (citations omitted, emphasis added). The Court later made clear "custodial interrogation" did not include typical roadside questions. *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). Thus, during this period in question, Defendant did not have any right to counsel under *Miranda*, so there could not be a violation of any right to counsel under *Miranda*.

Fourth, as noted above, Rule 6.1(a) of the Arizona Rules of Criminal Procedure delineates a right to consult with an attorney, but that right attaches only after a defendant is taken into custody. Because this period in question was before Defendant was taken into custody, she did not have any right to counsel under Rule 6.1(a), so there could not be a violation of any right to counsel under Rule 6.1(a).

B. *Did the trial court abuse its discretion in denying Defendant's Motion To Dismiss based on an alleged discovery violation.*

Defendant contends the trial court erred in denying her Motion To Dismiss based on an alleged discovery violation. When the state has failed to preserve evidence the exculpatory nature of which is unknown or is only potentially exculpatory, the defendant must show the state acted in bad faith in order to show a due process violation. *State v. Lehr*, 227 Ariz. 140, 254 P.3d 379, ¶¶ 36–42 (2011) (without consulting defendant's attorneys, state authorized DNA testing that consumed swab sticks from which DNA was extracted; defendant contended destruction of swab sticks denied him due process; court noted there was no evidence swab sticks were exculpatory (and indeed proved inculpatory because DNA on them matched defendant's DNA), and rejected defendant's contention that testing, which resulted in consuming them, without contacting his counsel, was bad faith; court held no due process violation); *State v. Speer*, 221 Ariz. 499, 212 P.3d 787, ¶¶ 36–38 (2009) (MCSO kept digital tape recordings of jail telephone calls for 6 months, and then tapes are reused; officers obtained court order to listen to tapes of calls defendant made, and copied 27 of them; officers did not copy nine tapes, and those were recorded over after 6 months; defendant moved to suppress 27 tapes that were copied, which trial court denied; court held that defendant failed to establish either that destroyed tapes contained material exculpatory evidence or that police acted in bad faith, thus defendant failed to establish due process violation); *State v. Womble*, 225 Ariz. 91, 235 P.3d 244, ¶¶ 14–18 (2010) (same as *State v. Speer*); *State v. Bocharski*, 200 Ariz. 50, 22 P.3d 43, ¶ 42 (2001) (court declined defendant's invitation to overrule *Youngblood* and discard the bad faith requirement, and further held evidence was not exculpatory, thus defendant would not have been entitled to relief); *State v. Walden*, 183 Ariz. 595, 607, 905 P.2d 974, 986 (1995) (defendant claimed state failed to preserve vaginal swab

from victim, but conceded state did not act in bad faith, and thus failed to establish due process violation); *State v. Vickers*, 180 Ariz. 521, 527–28, 885 P.2d 1086, 1092–93 (1994) (because defendant failed to show trial court acted in bad faith when it authorized destruction of evidence after first trial, defendant failed to establish a denial of due process); *State v. Bible*, 175 Ariz. 549, 593–94, 858 P.2d 1152, 1196–97 (1993) (because defendant failed to show police acted in bad faith when they did not preserve blood found on defendant's shirt, defendant failed to establish due process violation); *State v. Hill*, 174 Ariz. 313, 848 P.2d 1375 (1993) (because defendant was unable to show bad faith, he failed to show due process violation). For four reasons, this Court concludes Defendant has failed to show a due process violation.

First, Defendant has failed to show there was a videotape from the dash-cam. At the hearing on her Motion, Defendant never asked Officer McDaniel about any dash-cam, and thus failed to establish even that a videotape from a dash-cam existed. In her argument to the trial court, Defendant's attorney stated, "[H]e requests, through the professional standards bureau, that the dash cam be preserved and that it be produced." (R.T. of Aug. 9, 2011, at 57.) The fact that there was a dash-cam does not necessarily establish that there was a dash-cam video. Defendant's attorney further stated, "A copy of the video was requested through Professional Standards Bureau." (*Id.* at 74.) The fact that a copy of a video was requested does not necessarily establish that a video actually existed.

Second, assuming a videotape from the dash-cam existed, Defendant failed to establish it contained exculpatory evidence. Dash-cams are usually pointed out the front window of a police vehicle in order to videotape what might happen with the suspect's vehicle in front of the police vehicle. Defendant failed to establish where in relationship to the police vehicle the field sobriety tests took place, thus Defendant failed to establish the dash-cam would have recorded her performance on the field sobriety tests.

Third, assuming the dash-cam did record Defendant's performance on the field sobriety tests, she has failed to establish that videotape would have contained exculpatory evidence. Defendant asks this Court to assume she did well on the field sobriety tests, but she failed to make any such showing on the record. Defendant testified at the hearing, but she offered no testimony to refute Officer McDaniel's testimony that she had bloodshot, watery eyes, slurred speech, and a strong odor of alcohol, and that she showed three out of four cues on the one-legged stand test, and showed six out of eight cues on the walk-and-turn test.

Fourth, Defendant failed to show bad faith. The record showed the police department routinely recycled the videotapes after 90 days, and Defendant's attorney never made a specific request for videotapes until after that time. The trial court therefore correctly found Defendant failed to establish a due process violation.

Defendant seems to contend the trial court abused its discretion in not imposing some other sanction, such as giving a *Willits* instruction. When Defendant's attorney raised the possibility of a *Willits* instruction or the suppressing of evidence during her argument to the trial court, the trial

court noted she never asked for such relief in her Motion To Dismiss, and if she wanted any other type of relief, she would have to file a motion asking for such relief. Defendant's attorney never did file such a motion, so the trial court never had an opportunity to rule on such a request. Because Defendant did not present that request to the trial court, Defendant is precluding on appeal from obtaining relief on that basis.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motions To Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the West Mesa Justice Court.

IT IS FURTHER ORDERED remanding this matter to the West Mesa Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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